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Convention on the Rights of the Child

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Committee on the Rights of the Child

Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 7/2016*, **

Communication submitted by:	Z.Y. and J.Y. (represented by counsel, N.E. Hansen)
Alleged victim:	A.Y.
State party:	Denmark
Date of communication:	25 November 2016 (initial submission)
Date of adoption of Views:	31 May 2018
Subject matter:	Deportation of family with child to Afghanistan, where they claim a risk of persecution based on their alleged conversion from Islam
Procedural issues:	Exhaustion of domestic remedies; substantiation of claims
Substantive issues:	Prohibition of discrimination; best interests of the child; protection of the child against all forms of violence or ill-treatment
Articles of the Convention:	1, 2, 3, 6, 7, 8 and 19
Articles of the Optional Protocol:	7 (e) and (f)

* Adopted by the Committee at its seventy-eighth session (14 May–1 June 2018).

** The following Committee members took part in the consideration of the present communication: Suzanne Aho Assouma, Amal Salman Aldosery, Hynd Ayoubi Idrissi, Jorge Cardona Llorens, Bernard Gastaud, Olga A. Khazova, Hatem Kotrane, Gehad Madi, Benyam Dawit Mezmur, Clarence Nelson, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Angel Rodriguez Reyes, Kirsten Sandberg, Ann Marie Skelton, Velina Todorova and Renate Winter.

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1.1 The authors of the communication are J.Y. and Z.Y., both Afghan nationals born in 1992 and 1994 respectively. They are acting on behalf of their son, A.Y., born in Turkey on 4 February 2014. The authors and their son are subject to a deportation order to Afghanistan. They claim that their deportation would violate A.Y.'s rights under articles 1, 2, 3, 6, 7, 8 and 19 of the Convention. They are represented by counsel. The Optional Protocol entered into force for Denmark on 7 January 2016.

1.2 Pursuant to article 6 of the Optional Protocol, on 29 November 2016, the Working Group on Communications, acting on behalf of the Committee, requested that the State party refrain from returning the authors and their son to Afghanistan while their case was under consideration by the Committee. On 6 December 2016, the State party suspended the execution of the deportation order against the authors and their son.

Factual background

2.1 The male author (J.Y.) left Afghanistan and sought asylum in Norway in 2009. While in Norway, he converted to Christianity. His asylum request was rejected on an unspecified date and he was deported back to Kabul on 24 April 2012. On 19 July 2012, J.Y. filed an asylum application in Switzerland, which was also rejected. On 20 September 2012, he was transferred from Switzerland to Norway under the Dublin III Regulation.[1] On 8 October 2012, Norwegian authorities again deported him to Afghanistan, where he met the female author (Z.Y.). However, Z.Y.'s parents denied their consent to the authors getting married. A few months later, the couple left Afghanistan for Turkey, where their son, A.Y., was born.

2.2 On 7 August 2014, the authors travelled to Canada to seek protection. However, they were stopped in transit by Danish police at Copenhagen airport and, as a result, they filed an asylum claim in Denmark. In their claim, the authors argued a fear that the female author's uncle would kill the male author because the couple had left Afghanistan, that the male author would be considered an "enemy of Islamic State in Iraq and the Levant" for being of Hazara ethnicity and of Shia Muslim faith, and that he would be killed for having converted to Christianity. They further argued a fear that the female author would be killed by her family for having refused to marry her cousin to whom she had been promised in marriage, and having married the male author instead. On 12 June 2015, the Danish Immigration Service rejected the authors' application. This decision was upheld on appeal by the Refugee Appeals Board on 19 August 2015. The Board found that the authors had provided inconsistent statements — both before the Immigration Service and the Board — regarding their alleged conflict with the female author's family and their alleged persecution by the Taliban. The Board noted that the authors had lived in Afghanistan in 2012 without experiencing any problems with the Taliban. Finally, the Board considered that the male author's conversion was not genuine in the light of the fact that he was not acquainted with the Christian faith, he did not go to church and he had not informed his wife about his alleged conversion.

2.3 On 29 January 2016, the authors filed a request for the reopening of their case, arguing new grounds for asylum based on the female author's conversion to Christianity. On 11 March 2016, the Board refused to reopen the case since it considered that the female author's conversion was not genuine. It noted, inter alia, that she had first shown interest in Christianity as her deportation had become imminent, and that she had declared at the Board's oral hearing in August 2015 that she was of Shia Muslim faith.

2.4 On 28 March 2016, the female author filed a second request for the reopening of the authors' case, again based on her conversion to Christianity. She also argued a "change in the situation of families with children in Afghanistan",[2] and that her son, A.Y., would be

[1] European Union Regulation No. 604/2013 ("Dublin III Regulation") provides a mechanism for determining which country is responsible for examining an application for international protection that has been lodged in one of the member States by a third-country national or a stateless person.

[2] The authors invoked the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Afghanistan*, of 6 August 2013, according to which "UNHCR considers that internal flight or relocation may be a reasonable alternative only where the individual can expect to benefit from meaningful support of his or her own (extended) family, community or

killed as he would be considered an "illegitimate child born out of wedlock" and a Christian, and for not being circumcised. On 16 August 2016, the Board decided to resume the authors' case.

2.5 On 9 October 2016, Z.Y. and A.Y. were baptized. The authors submitted their baptism certificates to the Board before the hearing.

2.6 On 17 November 2016, the Board rejected Z.Y.'s application for review. The Board concluded that Z.Y. had failed to provide any new evidence that her or her husband's conversions were real. The Board noted, in this regard, that the male author had declared before the Immigration Service in March 2015 that he did not feel Christian. Also, in his declaration before the Board in August 2015, he had been unable to provide any details of his Christian beliefs and had explained that he did not go to church and did not know Christian festivities. As regards the female author, her interest in Christianity had only been aroused in August 2015, after her deportation had become imminent, and she had claimed to have been persuaded to convert by her husband, whose conversion had been deemed not genuine. Although she had shown some knowledge of Christianity, the Board concluded that her conversion was not an expression of inner conviction and accordingly not genuine.

2.7 The authors note that decisions by the Board are not subject to appeal before national courts and that they have therefore exhausted all available domestic remedies.

Complaint

3.1 The authors claim a violation of their son's rights under articles 1, 2, 3 and 19 of the Convention. They argue that the Board failed to take into consideration the principles of the best interests of the child and non-refoulement, and to conduct a risk assessment of his living conditions in Afghanistan.

3.2 The authors claim that their son was discriminated against, in violation of article 2 of the Convention, because his case was only handled by the Board without any possibility to appeal its decision of 17 November 2016.

3.3 The authors state that, under article 19 of the Convention, States parties are obliged to protect children against any harm or violence. In doing so, they must always take into consideration the best interests of the child.

State party's observations on the admissibility and merits of the communication

4.1 In its observations dated 24 May 2017, the State party argues that the authors' claims are inadmissible or, alternatively, without merit. The State party argues that the authors have failed to establish a prima facie case as they have not sufficiently substantiated their claim that their son would be exposed to a real risk of irreparable harm if returned to Afghanistan and, therefore, their claim should be declared inadmissible under article 7 (f) of the Optional Protocol.

4.2 The State party argues that the authors' claim based on article 2 of the Convention is manifestly ill-founded and inadmissible under article 7 (f) of the Optional Protocol.

4.3 The State party informs the Committee about the procedure before the Refugee Appeals Board.[3]

4.4 The State party notes that, as established by the Committee's general comment No. 6, States parties should not return a child to a country where there are substantial grounds for believing that he or she would be subjected to a real risk of irreparable harm, such as those contemplated under articles 6 and 37 of the Convention, either in the country to which

tribe in the area of prospective relocation. The only exception to this requirement of external support are single able-bodied men and married couples of working age without identified vulnerabilities, who may in certain circumstances be able to subsist without family and community support in urban and semi-urban areas that have the necessary infrastructure and livelihood opportunities" (p. 8).

[3] See, in this regard, the Committee's Views on *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), paras. 4.2–4.5.

removal is to be effected or in any country to which the child may subsequently be removed. The assessment of such risk should be conducted in an age and gender-sensitive manner.

4.5 The State party notes that the authors have not provided any new and specific information on their situation different to that already provided and assessed by the Board in its decision of 17 November 2016. The State party notes that national authorities are better placed to assess not only the facts of a case but, more particularly, the credibility of the authors, since they had an opportunity to hear them.[4] In the present case, careful consideration was given to the authors' and their son's particular circumstances. On that basis, the Board concluded that the authors had not rendered it probable that they would face a risk of persecution or abuse upon return to Afghanistan. The authors have failed to identify any irregularity in the decision-making process or any risk factors that the Board failed to take properly into account.

4.6 The State party notes that the authors' son was under 2 years old when their case was assessed by the Board, and that his grounds for asylum were interconnected with those of his parents. Therefore, his particular circumstances were assessed together with those of his parents. Since the Board did not accept as facts the purported conflict with the female author's family, it also had to reject the claim that their son would be considered an illegitimate child on his return to Afghanistan. The State party notes, in this respect, that the authors married in 2012 and their son was born in February 2014. The Board also concluded that neither of the authors had, in actual fact, converted. Given their son's age at the time of the proceedings, he was not able to make any statements during the interviews. Against this background, the authors were the ones obliged to provide any relevant information on their son's behalf, which they failed to do.

4.7 The State party notes that the fact that the Board failed to expressly invoke the Convention in its decision cannot imply that it did not take the Convention into account. The State party notes that the author's claim that the Board had failed to take their son's best interests into account was included in their request of 28 March 2016 to reopen their case. This information, together with the revision (dated 6 August 2013) of the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Afghanistan*, were thus available to the Board when it adopted its decision of 17 November 2016. It notes that the Board takes into account the Convention, as well as other relevant international treaties as a crucial element of its examination of applications for asylum in cases involving children.

4.8 The State party notes that the review by the Office of the United Nations High Commissioner for Refugees (UNHCR) of its Eligibility Guidelines only concerned the criteria for referring individuals to an internal flight alternative. In this regard, UNHCR considered that "internal flight or relocation may be a reasonable alternative only where the individual can expect to benefit from meaningful support of his or her own (extended) family, community or tribe in the area of prospective relocation. The only exception to this requirement of external support are single able-bodied men and married couples of working age without identified vulnerabilities, who may in certain circumstances be able to subsist without family and community support".[5] UNHCR replaced the previous term "core family" with "married couples of working age". However, in the present case, the Board refused the authors' grounds for asylum as it could not accept as a fact that they had any conflict with the Afghan authorities or family members that would justify asylum. Therefore, the authors are not compelled to find an internal flight alternative and the change in the terminology of the UNHCR Eligibility Guidelines is irrelevant in this case. In its jurisprudence, the Board has found that the security situation in Afghanistan is not of such nature as to independently justify residence under section 7 of the Danish Aliens Act.

4.9 As to the authors' claims under article 2 of the Convention, the State party notes that the decision of the Immigration Service refusing asylum to the authors was appealed to the Board, and that it was not until the Board had rendered its final decision that the female

[4] The State party cites, in this regard, the judgments of the European Court of Human Rights in the cases *R.C. v. Sweden* (application No. 41827/07), 9 March 2010, para. 58; and *M.E. v. Sweden* (application No. 71398/12), 26 June 2014, para. 78.

[5] UNHCR Eligibility Guidelines, p. 8.

author added as new grounds for asylum that she had converted to Christianity and that both she and her son had been baptized. The State party notes that, according to the Board's jurisprudence, new grounds for asylum presented after the decision of the Immigration Service do not automatically result in the case being referred back to the Immigration Service for reconsideration at first instance. In most cases, a referral is not required as it is possible for the Board to assess the new information on a fully informed basis at the Board hearing. A case will normally be referred back to the Immigration Service if new information has been provided on the asylum seeker's country of origin, or in the event of changes to the legal basis that are deemed essential to the determination of the case. Also, Board hearings are attended by a representative of the Immigration Service. Therefore, the Immigration Service considers if there are grounds for granting asylum before the Board reaches a decision on the case. Also, no provision in the Convention affords the right of appeal in a case like the present one.

4.10 The State party adds that the authors' son has not been subjected to discrimination of any kind due to his or his parents' race, colour, sex, religion or other status that would justify a violation of article 2 of the Convention.

Authors' comments on the State party's observations

5.1 In their comments dated 14 August 2017, the authors note that the situation in Afghanistan has considerably deteriorated since the communication was filed, including with regard to casualties among children. They indicate that, against this backdrop, Germany has decided to stop all deportations to Afghanistan. They argue that they originate from the Ghazni Province, which is the centre of heavy fighting between government forces and the Taliban. Additionally, their son has never been to Afghanistan and he is in need of international protection.

5.2 The authors allege that, even though their own cases are relevant for the evaluation of their son's need for international protection, his own situation needs to be taken into consideration as well, and his best interests should be a primary consideration. Socioeconomic conditions awaiting the child upon return should also be assessed.[6]

5.3 The authors claim that their son's return to Afghanistan would seriously limit his possibilities of survival and development, in violation of articles 1, 3 and 6 of the Convention. He would also face a lack of access to health services. Additionally, he would risk being separated from his parents and unable to register in Afghanistan, in violation of articles 7 and 8 of the Convention, respectively. They contend that the principle of non-refoulement is not limited to articles 6 and 37 of the Convention, but extend to other situations in which the child may face a risk of "serious consequences" if returned.

5.4 The authors allege that, even though their son's name was mentioned in the Board's decision of 17 November 2016, there were no arguments claiming that their son would be able to reside safely in Afghanistan or that it would not be against his best interests to deport him, and no reference to the provisions of the Convention. This is despite the fact that the authors had explicitly requested that the Board consider the Convention in its decision.

Additional submissions from the parties

6.1 In its observations dated 16 October 2017, the State party notes that the authors have not provided any new specific information on their alleged conflicts in Afghanistan, on which they had based their asylum claims.

6.2 As to the general security situation in Afghanistan, the State party insists that, based on the background information available — including the UNHCR Eligibility Guidelines — the situation is not of a magnitude such that it would independently justify residence in

[6] The authors cite the Committee's general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, para. 27.

Denmark. The State party cites, in this regard, jurisprudence of the Human Rights Committee[7] and the European Court of Human Rights.[8]

6.3 The State party argues that the requirement to take into account the safety, security and socioeconomic conditions awaiting the child upon return cannot be understood as a requirement that the asylum seeker have the exact same social living standards as children in Denmark. Rather, it means that their personal integrity must be protected. The Board considered that the authors' grounds for asylum could not be considered as facts and that they therefore did not risk persecution justifying asylum. Articles 3 and 19 of the Convention formed an integral part of the assessment undertaken by the Board, even though no express reference was made to the "best interests of the child".

6.4 Regarding the authors' new claims based on articles 6, 7 and 8 of the Convention, the State party argues that the authors have failed to provide any arguments to support these claims and that they should therefore be considered manifestly ill-founded and inadmissible under article 7 (f) of the Optional Protocol. The State party adds that the authors can opt for an assisted voluntary return, which ensures that the family is returned together. Also, there is no reason to assume that the authors' son would face any particular difficulties in being registered in Afghanistan.

7. On 17 November 2017, the authors reiterate their previous arguments.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure, whether it is admissible under the Optional Protocol.

8.2 The Committee notes the authors' uncontested argument that decisions by the Board are not subject to appeal before national courts and therefore all domestic remedies have been exhausted with regard to their claims based on articles 1, 3 and 19 of the Convention.

8.3 The Committee notes, however, that the authors' claims based on articles 7 and 8 of the Convention, referring to an alleged risk that the authors would be separated from their son upon return and that they would be unable to register him in Afghanistan, have never been raised before national authorities and domestic remedies have therefore not been exhausted. The Committee therefore considers these claims inadmissible under article 7 (e) of the Optional Protocol.

8.4 The Committee notes that the authors' claim based on article 6 of the Convention, referring to an alleged risk to their son's survival, has never been raised before national authorities and therefore declares it inadmissible under article 7 (e) of the Optional Protocol.

8.5 The Committee takes note of the authors' claim based on article 2 of the Convention that their son was discriminated against because his case was only handled by the Board without any access to an appeal. The Committee observes, however, that the authors' claim is general in nature and does not demonstrate that the lack of an appeal against the Board's decision of 17 November 2016 would be based on the authors' or their son's origin or any other discriminatory grounds. The Committee notes that the authors only raised specific asylum grounds concerning their son, A.Y., in their second request for the reopening of their case, which was filed with the Board on 28 March 2016. Therefore, the Committee considers that this claim is manifestly ill-founded and inadmissible under article 7 (f) of the Optional Protocol.

[7] *M.A. v. Denmark* (CCPR/C/119/D/2240/2013), para. 7.

[8] *A.G.R. v. the Netherlands*, application No. 13442/08, para. 59; *M.R.A. and others v. the Netherlands*, application No. 46856/07, 12 January 2016, para. 112; *S.S. v. the Netherlands*, application No. 39575/06, 12 January 2016, para. 66; and *A.W.Q. and D.H. v. the Netherlands*, application No. 25077/06, 12 January 2016, para. 71.

8.6 Finally, the Committee takes note of the authors' argument that their son's rights under articles 1, 3 and 19 were violated because the Board failed to take into consideration the principles of the best interests of the child and of non-refoulement.

8.7 The Committee recalls that the assessment of the existence of a risk of serious violations of the Convention in the receiving State should be conducted in a child and gender-sensitive manner,[9] that the best interests of the child should be a primary consideration in decisions concerning the return of a child, and that such decisions should ensure that the child, upon return, will be safe and provided with proper care and enjoyment of rights.[10] The best interests of the child should be ensured explicitly through individual procedures, as an integral part of any administrative or judicial decision concerning the return of a child.[11]

8.8 The Committee considers that it is generally for the organs of the States parties to review and evaluate facts and evidence in order to determine whether a risk of a serious violation of the Convention exists upon return, unless it is found that such evaluation was clearly arbitrary or amounted to a denial of justice.[12]

8.9 In the present case, the Committee notes that, in its decision dated 17 November 2016, the Board thoroughly assessed the authors' grounds for asylum based on their conversion to Christianity and their alleged conflict with the female author's family in Afghanistan, but rejected both grounds based on the authors' lack of credibility. The Board found the authors' statements to be inconsistent and their conversion non-genuine, based in particular on the male author's declarations of March 2015 that he did not feel Christian and did not go to church and on the female author's declarations of August 2015 that she was a Shia Muslim, the fact that she had converted only when her deportation had become imminent, and the fact that she had claimed to have been convinced to convert by her husband, whose conversion had not been considered genuine.

8.10 The Committee observes that, while the authors disagree with the conclusions reached by the Board, they have not shown that its assessment of the facts and evidence presented by the authors was arbitrary or otherwise amounted to a denial of justice.

8.11 The Committee does note that the Board failed to specifically address the risk of violations of the Convention that the authors' son, A.Y., would face upon return to Afghanistan or to explicitly take his best interests into consideration when deciding on the family's return.

8.12 Notwithstanding the above, the Committee observes that, in the particular circumstances of this case, the authors have not provided any arguments to justify the existence of a specific and personal risk of a serious violation of A.Y.'s rights enshrined in the Convention upon return. The Committee notes, in particular, that the authors have not explained why their child would be at such risk for not having been circumcised or for being considered "illegitimate" or "born out of wedlock", especially in the light of the uncontested argument advanced by the State party that the authors married in 2012 and that their son was born in 2014. The authors have also failed to justify the existence of a separate and individual risk based on their son's baptism, in the light of the conclusion that the authors' conversion was not genuine. In this regard, the Committee notes the State party's argument that, given A.Y.'s young age — below 2 years old — at the time when the risk assessment was conducted, his grounds for asylum based on his baptism were interconnected with the authors' own grounds, and that the authors' conversion was considered non-genuine. The Committee also notes that the male author had been deported twice back to Afghanistan in 2012 — after his alleged conversion — without having experienced any problems related to that conversion.

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[9] General comment No. 6, para. 27.

[10] Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, paras. 29 and 33.

[11] Ibid., para. 30.

[12] See *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2.

8.13 In the light of all of the above and while being aware of the deteriorating human rights situation in Afghanistan, the Committee considers that the authors have failed to justify a personal risk of a serious violation of A.Y.'s rights upon return to Afghanistan. The Committee therefore considers that this part of the communication is also insufficiently substantiated and declares it inadmissible under article 7 (f) of the Optional Protocol.

9. The Committee decides:

(a) That the communication is inadmissible under articles 7 (e) and (f) of the Optional Protocol;

(b) That this decision shall be transmitted to the authors of the communication and, for information, to the State party.